No. 672

JOHN F. DAVIS, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GIANT FOOD INC., *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner GIANT FOOD INC. prays that a writ of certiorari issue to review a final decree of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on September 18, 1962.

JURISDICTION

The final decree of the Court of Appeals for the District of Columbia Circuit was entered on September 18, 1962 (Appendix "B"). Rehearing and/or rehearing en banc was denied on September 18, 1962. The jurisdiction of this Court is invoked under Title 15 of the United States Code, Section 45(c), and Title 28 of the United States Code, Section 1254(1).

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit which is reprinted in Appendix "A" is reported at 307 F. 2d 184. The final decree

of the Court of Appeals for the District of Columbia Circuit, which is not officially reported, is reprinted in Appendix "B". The opinion of the Federal Trade Commission is officially reported at FTC and is reprinted as part of the Joint Appendix, at page 121. The initial decision of the Hearing Examiner, which is not officially reported, is reprinted in the Joint Appendix, at page 81.

QUESTIONS PRESENTED

1. Whether a buyer can be held under Section 5 of the Federal Trade Commission Act, to have knowingly induced payments prohibited by Section 2(d) of the Robinson-Patman Act by requesting and receiving payments from some of its suppliers for promotional facilities, without proof being adduced by counsel supporting the Complaint that products of a grade and quality similar to the products on which the payments were made, were ever sold by said suppliers to competitors of the buyer.

2. Whether counsel supporting a Federal Trade Commission complaint charging a buyer with a violation of Section 5 of the Federal Trade Commission Act on the ground that the buyer has knowingly induced and received payments prohibited by Section 2(d) of the Robinson-Patman Act from its suppliers, must as part of his prima facie case prove that the suppliers, from whom the buyer accepted such payment, had no defense to the alleged violation of Section 2(d) of the Robinson-Patman Act, such as meeting competition.

3. Whether proof that a buyer knew that some suppliers did not accept its invitation to participate in its anniversary sale by purchasing promotional facilities which the buyer offered to make available to

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the suppliers because, as some of the suppliers stated, "They could not do so without violating the Robinson-Patman Act," establishes a prima facie case that the buyer also knew or should have known that those suppliers who did participate in its Anniversary promotion in fact violated the Robinson-Patman Act.

4. Whether the final decree of the Court of Appeals comports with the admonition of this Court that orders to cease and desist should be at their outset "sufficiently clear and precise to avoid raising serious questions as to their meaning and application . . . ." *Federal Trade Commission* v. *Henry Broch & Co.* U.S. , 82 S. Ct. 431 (1962).[1]

STATUTES INVOLVED

The pertinent provisions of Section 5 of the Federal Trade Commission Act, 52 Stat. 111 (1938), as amended, 66 Stat. 632, 15 U.S.C. § 45 (1958), are as follows:

> "Sec. 5. (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

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[1] In the event certiorari is granted, the following additional questions will be presented:

(a) Whether the acts and practices proscribed by the complaint or revealed by the record are unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act;

(b) Whether petitioner was a packer as defined by the Packers and Stockyards Act of 1921, 7 U.S.C. 191 and therefore exempt from regulation by the Federal Trade Commission;

(c) Whether the Commission adduced competent and substantial evidence upon the whole record to sustain its findings, decision, and order;

(d) Whether petitioner was denied due process of law in violation of the Fifth Amendment of the Constitution of the United States; and

(e) Whether the final decree of the Court of Appeals is overreaching, oppressive, ambiguous or improper.

The pertinent provisions of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 19 Stat. 1526 (1936), 15 U.S.C. § 13 (1958), are as follows:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. . . .

* * * * * *

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * * *

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce knowingly to induce or receive a discrimination in price which is prohibited by this section."

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STATEMENT OF THE CASE

This petition seeks review of a final decree of the United States Court of Appeals for the District of Columbia Circuit which affirmed a decision and an order (as modified by said Court) of the Federal Trade Commission. The order (Appendix "B"), entered under Section 5 of the Federal Trade Commission Act, directs petitioner, who operates a chain of supermarkets in Maryland, Virginia, and the District of Columbia, to cease and desist from:

> "Inducing and receiving, receiving, or contracting for the receipt of, anything of value from any supplier as compensation or in consideration for display or promotional services or facilities furnished by or through [petitioner] in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when [petitioner] knows or could reasonably have learned that such compensation or consideration is not affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with [petitioner] in the sale and distribution of such supplier's products."

The evidence in the record[2] before the Commission showed that during the years 1954, 1955, and 1956, petitioner sponsored three annual anniversary sales (J.A. 121). For each of these sales, petitioner invited all of its more-than-five-hundred suppliers to participate in promotional activities conducted during the sales (J.A. 121). Many suppliers accepted petitioner's invitation; others declined. Those who accepted petitioner's invitation executed a contract of participa-

[2] Petitioner rested at the conclusion of the Commission's case.

tion puursuant to which they made a payment to the petitioner, in return for which petitioner performed services for them as described in the contract. A few of the suppliers who declined petitioner's invitation advised petitioner that they could not accept petitioner's invitation because they were not making similar payments available to other of their customers (J.A. 242A, 243, 244, 244A-F, 245, 247, 250).

The testimony of representatives of some of petitioner's suppliers is in the record. Some of these representatives testified that their companies had participated in one or more of petitioner's anniversary sales (J.A. 146, 151, 156, 168, 184). Of these, some stated that they did not offer payments similar to those made to the petitioner to other of their customers; others stated that while they did not offer such payments to other of their customers they did participate in anniversary sales conducted by other firms operating grocery stores and supermarkets in Maryland, Virginia, and the District of Columbia (J.A. 149, 154, 159, 170). None of these witnesses testified as to the specific products[3] they had sold to any of petitioner's competitors either before, during, or after petitioner's anniversary sale, or whether the payments to petitioner had or had not been made to meet competition. One witness engaged in the grocery business in the District of Columbia testified that he had not received any payments similar to those made to the petitioner from any of his suppliers. He did not testify as to any specific products[3] that he had purchased from any of

[3] Their testimony was simply that they had sold their general line of products in a given area and had made payments to petitioner, without reference to whether a product of like grade and quality to the one on which the payment to petitioner had been

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the suppliers participating in petitioner's anniversary sale. His testimony, like the testimony of the supplier witnesses, was addressed only to the general line of products sold by suppliers without reference to goods of like grade and quality (J.A. 173 *et seq.*).

On the foregoing record, the Federal Trade Commission found that petitioner had knowingly induced and received payments prohibited by Section 2(d) of the Robinson-Patman Act and concluded that petitioner had thereby violated Section 5 of the Federal Trade Commission Act (J.A. 121 *et seq.*).

The Commission said (J.A. 124) that it was "reasonable to infer that products of grade and quality similar to those [petitioner] promoted in the [anniversary] sales were also being resold by [petitioner's] competitors not sharing in the [payments]" and therefore that there was adequate basis in the record for finding that petitioner's suppliers had violated Section 2(d) of the Robinson-Patman Act by participating in petitioner's anniversary sales. Petitioner knew or should have known, the Commission said (J.A. 125-126) that the payments which it had "solicited" were "preferential" and hence in violation of Section 2(d) of the Robinson-Patman Act because petitioner (1) had initiated the series of transactions which had given rise to the payments and (2) had provided in each of its contracts of participation that "they were not to alter or replace currently existing advertising or

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made was ever sold to any other of their customers in that area. This is precisely the type of proof which the United States Court of Appeals for the Second Circuit deemed insufficient to sustain a decision and order of the Federal Trade Commission addressed to one of the suppliers who had participated in petitioner's anniversary sales. *Atalanta Trading Corporation* v. *Federal Trade Commission*, 258 F. 2d 365 (C.A. 2, 1958).

merchandising agreements between [petitioner] and the contributing [suppliers]."

Petitioner contended that the Commission's novel interpretation of Section 5 of the Federal Trade Commission Act and its strained construction of the record produced an absurd result which conflicted in substance with the decision of the United States Court of Appeals for the Second Circuit in *Atalanta Trading Corporation* v. *Federal Trade Commission,* 258 F. 2d 365 (C.A. 2, 1958), and in principle with the decision of this Court in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, 73 S. Ct. 1017 (1953), as well as the decision of the United States Court of Appeals for the District of Columbia Circuit in *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* 301 F. 2d 499 (C.A. D.C., 1961), cert. denied U.S. , 82 S. Ct. 1162 (1962). It not only cast upon petitioner the immediate and substantial burden of showing either (1) that the payments which it had received from more than 150 participating suppliers had been made by participating suppliers to meet competition or (2) that participating suppliers[4] had proportionalized payments among competing purchasers of goods of like grade and quality to those on which payments had been made to petitioner. The difficulties which inhere in determining and showing that payments which the petitioner accepted were made to

[4] This was the necessary result of the proof adduced by the Commission which showed merely that suppliers had sold general lines of products in a given area and had granted payments to petitioner, without proof of whether products of like grade and quality to the ones on which the payments had been made to petitioner were ever sold by any suppliers to other customers in the area. As an example see J.A. 186 and compare with *Atalanta Trading Corporation* v. *Federal Trade Commission,* supra.

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meet competition or that 150 participating suppliers had proportionalized their payments within the meaning of Section 2(d) of the Robinson-Patman Act are at least of the magnitude of those which inhere in determining whether a supplier's prices to a given buyer are cost justified. Cf. *Automatic Canteen Co. v. Federal Trade Commission,* supra. To make such determinations, petitioner had to know the names and operating addresses of each supplier's customers, the nature of their customers' business, the specific products purchased by their customers, the quantities of specific products purchased by their customers, the dates of purchase, what products the suppliers's competitors were selling of a grade and quality similar to those on which the supplier made payments to the petitioner, and what payments the supplier's competitors were making in connection with those products. Without these facts, neither the Commission nor the petitioner could fairly show or even determine whether participating suppliers had made payments to meet competition, had a duty to proportionalize payments in the first instance, or, assuming a duty, had in fact proportionalized. Because of their confidential nature, the facts necessary to make a determination concerning whether participating suppliers had made payments prohibited by Section 2(d) of the Robinson-Patman Act were not available to the petitioner. Moreover, if they had been made available, petitioner could have obtained them, if at all, only upon examination of the regular business records of its more-than-150-participating suppliers, whose offices were spread across the United States. To subject petitioner to such a burden is not only inequitable but unconscionable in the extreme, especially where there were no circumstances —and none shown in the record—indicating that peti-

tioner knew, should have known, or had any reason to suspect that participating suppliers were making payments prohibited by Section 2(d) of the Robinson-Patman Act. Petitioner knew that its competitors conducted anniversary sales, in the course of which they received payments for promotional facilities from suppliers. (J.A. 133-146) Petitioner had also obtained copies of anniversary contracts which one of its major competitors, Food Fair, Inc., had entered into with suppliers during its anniversary sales. Petitioner's anniversary contract was specifically modeled after the contract which Food Fair, Inc. had used in the course of its anniversary sales (J.A. 146). Moreover, there was no evidence in the record even suggesting that petitioner's participating suppliers advised the petitioner that they were, or might be, violating the Robinson-Patman Act by participating in its anniversary sales; nor was there even the faintest indication that petitioner had used any type of pressure or coercion to obtain participation by suppliers.[5] To be sure, some suppliers advised petitioner that they could not participate in its anniversary sales but none of the invitations to these suppliers resulted in payments to the petitioner, prohibited or otherwise.

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[5] It would be hard to imagine that petitioner could have coerced or pressured such major sources as Armour & Co., Crosse & Blackwell Co., or Minute Maid Corporation to participate in its anniversary sale. Thus, the Commission was not in a position to argue, as it did in *American News Company* v. *Federal Trade Commission*, 300 F. 2d 104 (C.A. 2, 1962) and *Grand Union Company* v. *Federal Trade Commission*, 300 F. 2d 92 (C.A. 2, 1962), and in its brief opposing the petition for writ of certiorari filed by American News Company, that payments prohibited by Section 2(d) of the Robinson-Patman Act had been induced through pressure and coercion. (At page 7).

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Petitioner reasoned that the payments which it had received from its suppliers were not prohibited by Section 2(d) of the Robinson-Patman Act at the time of their receipt. They became unlawful, if at all, only if the suppliers making such payments subsequently failed to proportionalize them in connection with their sale of goods of like grade and quality to those on which the payments had been made to customers competing with petitioner. Petitioner had absolutely no way of knowing whether suppliers did or would proportionalize payments in conformity with Section 2(d) of the Robinson-Patman Act; but it had a right to, and did, rely upon the fundamental presumption that in the absence of circumstances to the contrary, suppliers participating in its anniversary sales were conforming to the letter and spirit of all laws, including but not limited to the Robinson-Patman Act.

In affirming the Commission's decision, the United States Court of Appeals for the District of Columbia Circuit took the view that the fundamental question at issue was not whether petitioner "knew" or "should have known" it was receiving payments prohibited by Section 2(d) of the Robinson-Patman Act, but, rather, whether petitioner "at the time it induced and received the payments possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to [its] customers" (307 F. 2d at 187; p. 5a). The "cumulative effect" of the facts that (1) non-participating suppliers advised petitioner that they could not proportionalize payments, (2) the contract of participation supplemented currently existing cooperative advertising contracts, and (3) the contract of participation was vague and general,

was sufficient, the Court of Appeals said (307 F. 2d at 187; p. 6a), to support a finding that petitioner knew that it was the beneficiary of "disproportionate payments through the program which it originated and sponsored" and therefore that the petitioner had knowingly induced payments prohibited by Section 2(d) of the Robinson-Patman Act.

The Court of Appeals modified the Commission's order to cease and desist to conform to its opinion by inserting language which obligated petitioner to affirmatively determine whether payments which it received from its suppliers, whether initiated by it or not, were in fact affirmatively offered or otherwise made available on proportionally equal terms by suppliers to all other customers competing with petitioner in the sale and distribution of such suppliers' products (Appendix "B", p. 9a).

After the decision below, petitioner filed a petition for rehearing; the Court of Appeals denied petitioner's petition for rehearing on September 18, 1962.

REASONS FOR GRANTING WRIT

I. From the Standpoint of Its Impact on Our Competitive System, This Case Presents One of the Most Important Robinson-Patman Act Federal Trade Commission Act Cases to Come Before This Court Since Automatic Canteen Co. v. Federal Trade Commission

This is a case of first impression in this Court. It presents issues of substantial constitutional importance in the administration and enforcement of both the Robinson-Patman Act and the Federal Trade Commission Act. The decision affects not only thousands of retail food store operators[6] throughout the nation, but

[6] According to the 1958 Census of Manufacturers, there were in the United States 355,508 retail food stores reporting total sales of $49,022,333,000.

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also every other retail business which utilizes some form of cooperative advertising program in conjunction with its suppliers. The Commission's order, as modified by the Court of Appeals, confronts every buyer-retailer in interstate commerce with the peril that it has violated Section 5 of the Federal Trade Commission Act if it accepts payments for cooperative promotional facilities which it furnishes to its suppliers without first determining whether (1) the supplier has any defenses, such as meeting competition or (2) proportionalized payments to the buyer's competitors on goods of like grade and quality.

This petition, is in a realistic sense a request for a final determination of the issues presented for the benefit of a whole class of persons generally classified as retailer-buyers. Underneath the substantive issues which have been presented is the substantial question of whether a buyer-retailer can fairly bargain with its suppliers and, if so, under what circumstances he can bargain over the terms and conditions on which he will purchase merchandise for resale, including but not limited to terms of cooperative advertising.

The interpretation which the Commission has placed upon Section 5 to proscribe knowing inducement of payments prohibited by Section 2(d) of the Robinson-Patman Act reverses prima facie proof procedures and unreasonably limits the freedom which buyers heretofore exercised in the arena of free competition. As interpreted by the Commission, a buyer has committed a substantive violation of Section 5 of the Federal Trade Commission Act if its suppliers, after making a payment to said buyers, fail to offer other of their customers competing with the buyer payments proportional to those made to the buyer on goods of like

grade and quality. Such a construction charges a buyers with a violation of the Federal Trade Commi sion Act for acts which their suppliers failed to pe form and over which the buyers have no control. A buyers are deemed to have knowingly induced unlawf payments if it ultimately turns out that the paymen which they accepted from their suppliers violated Se tion 2(d) of the Robinson-Patman Act. This constru tion renders nugatory the word "knowledge," whi constitutes a substantive part of the Commission Section 5 charge, and denies due process of law.

If sustained, the decision of the Commission and t Court could become a precedent of major magnitu for simplified enforcement of the Robinson-Patm Act not only by the Commission but by plaintiffs sui for treble damages.

II. This Decision Conflicts in Substance With the Decisi of the United States Court of Appeals for the Seco Circuit in Atalanta Trading Corp. v. Federal Trade Co mission, in Principle With the Decision of This Co in Automatic Canteen Co. v. Federal Trade Commissi and the Decision of the United States Court of Appe for the District of Columbia Circuit in Exquisite Fo Brassiere Co. v. Federal Trade Commission.

By charging petitioner with having knowingly i duced and received payments prohibited by Secti 2(d) of the Robinson-Patman Act under Section 5 the Federal Trade Commission Act, rather than und Section 2(f)[7] of the Robinson-Patman Act, the Co mission deliberately sought to circumvent the judici

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[7] Compare footnote 14, *Automatic Canteen Co.* v. *Federal Tra Commission*, supra, with *Exquisite Form Brassiere Co.* v. *Fede Trade Commission*, 301 F. 2d 499 (CA DC 1961).

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strictures enunciated by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission, supra.* The complaint was novel and without precedent.[8] In the words of Circuit Judge Moore's dissenting opinion in *Grand Union* v. *Federal Trade Commission,* 300 F. 2d at 102, in which the Commission charged that Grand Union had coerced certain of its suppliers into making payments prohibited by section 2(d) of the Robinson-Patman Act:

> "The Complaint is a hybrid. Certain words of section 2(f), 'knowingly inducing or receiving,' are combined with the provisions of 2(d), namely, benefits not 'made available on proportionally equal terms.' The Commission then adds phrases to be found in 2(a) that the practices complained of 'are to the prejudice and injury of competitors and the public' and have a tendency to obstruct and restrain commerce. Unable to charge (much less prove) a violation of 2(a), 2(d) or 2(f) and unable to avoid the inexorable mathematical law that three zeros still total zero, the Commission precipitately abandons the Clayton Act which had so generously contributed its language (but not its blessing) to the complaint and by *force majeure* seeks the protection of its natal act, alleging that [petitioner] is guilty of 'unfair methods of competition and unfair acts and practices in commerce,

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[8] The "Supermarket News" for November 28, 1955, in reporting the initiation of this proceeding, by the Commission said:

"Federal Trade Commission officials recognize that they are taking a 'calculated risk' in charging two major retail food chains with improperly inducing and receiving special promotional allowances from suppliers.

"They confirmed at the weekend that this is the first time an effort has been made to reach retailers under Section 5 of the Federal Trade Commission Act for such practices. The case constitutes a precedent."

> in violation of Section 5 of the Federal Trade Commission Act.' Having just cast off sections 2(d) and (f), the Commission quickly returns to them to turn (by some alchemic process) these two paragraphs not violated by [petitioner] into a violation of section 5."

In this proceeding, the Commission not only "precipitately abandoned" the enforcement provisions of the Clayton Act but also cast aside the evidentiary prerequisites which were necessary to establish the charges in its complaint. The decision, under the cloak of Section 5, effectively ignores the difficult problems of proof which the Commission has heretofore unsuccessfully encountered in *Atalanta Trading, supra, Automatic Canteen, supra,* and *Exquisite Form, supra.* A careful analysis of the decision, which sustains the calculated action of the Commission, shows that the Commission has, in the process of adjudicating an ostensible violation of one of the statutes which it is charged with enforcing, (Section 5 of the Federal Trade Commission Act) effectively legislated a new substantive violation to counteract judicial decisions construing the Robinson-Patman Act. It is not difficult to imagine that if the decision is sustained, Section 5 could become a sturdy crutch on which the Commission could lean to obviate the absolute evidential prerequisites of the Robinson-Patman Act.

(A) The Substantive Conflict with Atalanta Trading Corp.:

Neither the terms of the Commission's complaint nor Section 2(f) of the Robinson-Patman Act proscribe the knowing inducement of lawful discriminations. Section 2(f) of the Robinson-Patman Act and the complaint prohibit only unlawful discriminations

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which are known by their recipients to be unlawful. On this propostion there is no dispute in this case.

It is axiomatic that to establish the unlawfulness in fact of payments which petitioner accepted during its anniversary sales, the Commission had to prove (a) that the payments made to petitioner by its suppliers were not offered by such supplers to others of their customers competing with petitioner (b) on proportionally equal terms (c) on goods of like grade and quality, and (d) that the suppliers making the payments had no defenses to the alleged illegality, such as meeting competition, assuming adequate proof of (a), (b), and (c).

The Commission eliminated these absolute and fundamental requirements from its proof. It did not prove (a) that the payments made to petitioner by its suppliers during its anniversary sales were not offered by such suppliers to other of their customers competing with the petitioner (b) on proportionally equal terms (c) on goods of like grade and quality. The tenor of the Commission's decision makes this abundantly clear. The decision states (J.A. 124) that it was "reasonable to *infer* that products of grade and quality similar to those [petitioner] promoted in the [anniversary] sales were sold by [petitioner's] competitors not sharing in the [payments]. . . ." (emphasis supplied)

The Commission's decision proceeds on the assumption that (J.A. 122) if petitioner's suppliers made payments to petitioner for promotional facilities without making payments to customers competing with petitioner, the suppliers had violated Section 2(d) of the Robinson-Patman Act. This is the very same assumption which the United States Court of Appeals for the

Second Circuit held insufficient to sustain a decision against one of the petitioner's suppliers, charging that the supplier had violated Section 2(d) of the Robinson-Patman Act by making payments to petitioner during petitioner's anniversary sales. *Atalanta Trading Corp.* v. *Federal Trade Commission, supra.*

In Atalanta Trading, *supra,* the Commission sought to prove that Atalanta had violated Section 2(d) by showing that Atalanta had made payments to the petitioner during its anniversary sales without offering payments on its entire line of products to customers competing with petitioner. The Commission asserted that proof of these facts was sufficient to demonstrate a violation of Section 2(d). The Court of Appeals reversed the Commission's decision, holding that to establish a violation the Commission had to prove that the payments which Atalanta made to petitioner during petitioner's anniversary sales were not offered on proportionally equal terms by Atalanta to others of its customers competing with petitioner on proportionally equal terms on goods of like grade and quality. The Court of Appeals said: (258 F. 2d at 368-370)

> "We cannot accept the Commission's expansive interpretation of Section 2(d), namely, that after showing a supplier has sold a general line of products in a given area and has granted allowances only to [petitioner], *it is immaterial whether or not a product of like grade and quality to the one on which the allowance was made was ever sold to any other customer in that area.*
>
> ". . . *the existence of another competing purchaser of a product of like grade and quality must also be shown and proof thereof is an essential part of the Commission's case.* . . . To adopt the Commission's argument would be tantamount to

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striking out from Section 2(d) the qualifying phrase 'competing in the distribution of such products or commodities' and overruling the prior decisions holding that 'such products' means products of like grade and quality." (emphasis supplied)

In the present proceeding, as in *Atalanta Trading*, the record shows only that suppliers selling a general line of merchandise in a given area had granted payments to one customer, the petitioner, without showing whether products of a grade and quality similar to the one on which the payments were made were ever sold to any other customers in the area in which petitioner conducted its business. As a result, the Commission in this case, as in *Atalanta*, did not establish that any suppliers making payments to the petitioner during the petitioner's anniversary sales violated Section 2(d) of the Robinson-Patman Act. This was an essential element which does not appear in the record.

Evidence in the record showing that petitioner's suppliers made payments to petitioner without making payments to customers competing with petitioner proves nothing. The Commission did not prove in the first instance that any of petitioner's participating suppliers had any duty to offer payments on proportionally equal terms to customers competing with petitioner. Only by showing that one of petitioner's participating suppliers sold a product of like grade and quality to the petitioner and to one of petitioner's competitors could the Commission establish such a duty. The Robinson-Patman Act imposes no requirement that a supplier make payments for promotional facilities on all his products if he elects to accord them on less than all products. *In the Matter of Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1545-1546 (1956).

The foregoing makes it clear that the elements of proof which were deemed sufficient to establish a violation of Section 2(d) of the Robinson-Patman Act in this proceeding were exactly those which were not sufficient to establish a violation of Section 2(d) of the Robinson-Patman Act in *Atalanta Trading Corp.* This decision and the decision in *Atalanta Trading Corp.* are in direct conflict.

(B) The Conflict in Principle with Automatic Canteen Co. and Exquisite Form Brassiere Co.:

1. *The 2(b) Defense*

In *Automatic Canteen,* this Court held, over vigorous objections of the Federal Trade Commission, that to establish a prima facie case in a proceeding under Section 2(f) of the Robinson-Patman Act, the Commission had to prove not only that the prices which a buyer received were discriminatory but also that they could not be cost-justified. This Court said (at 74, 77-79):

> "We therefore conclude that a buyer is not liable under § 2(f) if the lower prices he induced are either within one of the seller's defenses, such as cost-justification, or not known by him *not* to be within one of those defenses. . . .
>
> * * *
>
> "The Commission argues that a prima facie case of knowledge is made out when it is shown that the buyer knew the facts making the price differential violative of § 2(a). *At another point it urges that it must now show only 'that the buyer affirmatively contributed to obtaining the discriminatory prices by special solicitation, negotiation or other action taken by him.'* . . .
>
> ". . . We think we must read the infelicitous language of § 2(b) as enacting what we take to be

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its purpose, that of making it clear that ordinary rules of evidence were to apply in Robinson-Patman Act proceedings. . . . If that is so, however, decisions striking the balance of convenience for Commission proceedings against sellers are beside the point. And we think the fact that the buyer does not have the required information, and for good reason should not be required to obtain it, has controlling importance in striking the balance in this case. This result most nearly accommodates this case to the reasons that have been given by judges and legislators for the rule of § 2(b), that is, that the burden of justifying a price differential ought to be on the one who 'has at his peculiar command the cost and other record data by which to justify such discriminations.' Where, as here, such considerations are inapplicable, we think we must disregard whatever contrary indications may be drawn from a merely literal reading of the language Congress has used. *It would not give fair effect to § 2(b) to say that the burden of coming forward with evidence as to costs and the buyer's knowledge thereof shifts to the buyer as soon as it is shown that the buyer knew the prices differed. Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint is on a better footing to obtain this information than the buyer.* Indeed, though it is of course not for us to enter the domain of the Commission's discretion in such matters, the Commission may in many instances find it not inconvenient to join the offending seller in the proceedings." (Emphasis supplied)

The Commission did not recognize the burden of the 2(b) defense in the present proceeding. The record fails to show either that the suppliers making payments to the petitioner had no defenses under Sec-

tion 2(b) or that petitioner knew that the suppliers making the payments had no defenses under Section 2(b).

Certainly, the payments which petitioner received were not unlawful if a 2(b) defense were available. Surely, under the circumstances of this proceeding where the petitioner (1) raised the issue of the 2(b) defense in its initial pleading to the complaint (J.A. 17); and (2) subsequently sought unsuccessfully to consolidate[9] its case (J.A. 18-22) with supplier cases which the Commission simultaneously brought against a number of suppliers participating in petitioner's anniversary sales, the Commission ought to have borne this burden.

The decision of the Commission proceeded upon an erroneous assumption. The Commission assumed that Section 2(b) provided no defense to a charge under 2(d). See *In the Matter of J. H. Filbert, Inc.*, 54 F.T.C. 359 (1957), a 2(d) proceeding against a supplier participating in petitioner's anniversary sales who tried to raise the 2(b) defense. That this assumption was incorrect was subsequently demonstrated by *Exquisite Form Brassiere Co.* v. *Federal Trade Commission, supra,* in which the Court of Appeals for the District of Columbia Circuit remanded a Commission decision involving a 2(d) charge to the Commission with instructions to afford a supplier "an opportunity to present, if it be so advised, a defense under Section 2(b) of the Robinson-Patman Act."

While this Court's decision in *Automatic Canteen* pointed out that its ruling was limited to the facts in

[9] Compare this procedure with the procedure of joining offending suppliers suggested by this Court at 79 in its Opinion in *Automatic Canteen*, supra.

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that case and while the Court noted that "evidence that a seller's price was made to meet a competing seller's offer to a buyer might be available to a buyer more readily even than to a seller," petitioner submits that, in the absence of evidence that the evidence is more available to the buyer than to the seller, the prima facie rules of *Automatic Canteen* must still obtain. Petitioner believes that these rules apply in this proceeding and therefore, submits that the decision which it now seeks to have reviewed, conflicts in principle with *Automatic Canteen.*

2. *The Burden of Proof*

This proceeding and the proceeding before this Court in *Automatic Canteen* closely parallel one another in many major respects.

In this proceeding, as in *Automatic Canteen,* the petitioner initiated a series of transactions giving rise to a charge that it had knowingly induced discriminations prohibited by the Robinson-Patman Act.

In this proceeding, the Commission asserts that the petitioner knew or should have known that the payments which it had solicited were "preferential" and, hence, in violation of Section 2(d) of the Robinson-Patman Act because each of the contracts of participation which it "solicited" provided that "they were not to alter or replace currently existing advertising or merchandising agreements between [petitioner] and the contributing [suppliers]." Similarly, in *Automatic Canteen,* the Commission asserted that the petitioner knew that the prices which it received were discriminatory because it knew that the prices which it paid were lower than the prices paid by its competitors.

In *Automatic Canteen,* the Commission sought to shift to the petitioner the burden of showing (1) that the price discriminations were not prohibited because they were cost-justified; and (2) that petitioner had no knowledge that they were discriminatory. Likewise, in this proceeding, the Commission seeks to shift to the petitioner the burden of showing (1) that the payments were not prohibited because they were in fact available on proportionally equal terms; and (2) that petitioner had no knowledge that the payments were prohibited.

The language of *Automatic Canteen,* in which this Court rejected many of the very same arguments which the Commission used to sustain its decision in this proceeding, is instructive:

> "Section 2(f) of the Robinson-Patman Act, roughly the counterpart, as to buyers, of sections of the Act dealing with discrimination by sellers, is a vital prohibition in the enforcement scheme of the Act. In situations where buyers may have difficulty in proving their sellers' costs, § 2(f) could, if the Commission's view in this case prevails, become a major reliance for simplified enforcement of the Act not only by the Commission but by plaintiffs suing for treble damages. Such enforcement, however, might readily extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other other antitrust legislation. We therefore thought it necessary to grant certiorari. 344 U.S. 809, 73 S. Ct. 16.
>
> * * *
>
> "No doubt the burden placed on petitioner to show his sellers' costs, under present Commission standards, is heavy. Added to the considerable burden that a seller himself may have in demon-

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strating costs is the fact that the data not only are not in the buyer's hands but are ordinarily obtainable even by the seller only after detailed investigation of the business. A subpoena of the seller's records is not likely to be adequate. It is not a question of obtaining information in the seller's hands. It is a matter of studying the seller's business afresh. Insistence on proof of costs by the buyer might thus have other implications; it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies, and it might also expose the seller's cost secrets to the prejudice of arm's-length bargaining in the future. Finally, not one but, as here, approximately 80 different sellers' costs may be in issue"

The Court explained the purposes of Section 2(f) in the following manner (at 74):

"The Commission's attempts in this case to limit the word 'knowingly' . . . are not, we think, justified by the language Congress has used. The Commission argues that Congress was attempting to reach buyers who through their own activities obtain a special price and that 'knowingly to induce or receive' can be read as charging such buyers with responsibility for whatever unlawful prices result. But that argument would comprehend any buyer who engages in bargaining over price. If the Commission means buyers who exert undue pressure, the argument might find greater support in the legislative background but less in the language Congress has employed. Such a reading not only ignores the word 'receive' but opens up even more entangling difficulties with interpretation of what is undue pressure.

* * *

> "Not only are the arguments of the Commission unsatisfying, but we think a fairer reading of the language and of what limited legislative elucidation we have points toward a reading of § 2(f) making it unlawful only to induce or receive prices known to be prohibited discriminations. For § 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act could discourage undue pressure from the buyer. Of course, such devices for private enforcement of the Act through fear of prosecution could equally well have been achieved by providing that the buyer would be liable if, through the seller or otherwise, he learned that the price he sought or received, was lower than that accorded competitors, but we are unable, in the light of congressional policy as expressed in other antitrust legislation, to read this ambiguous language as putting the buyer at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated . . ."

One of the most significant features of the record in this proceeding is the absolute absence of any evidence that petitioner pressured or coerced any of its suppliers into making promotional payments during its anniversary sales. The record does show on the other hand that suppliers accepted petitioner's invitation to participate because they were getting full value for their payments,[10] and because they participated in other similar sales conducted by petitioner's competitors (J.A. 149, 154, 159, 170). Moreover, the record

[10] The Commission's charge that petitioner was not expending or giving full value for each of the payments, which is in effect a charge that petitioner had knowingly induced a price discrimination, was dismissed by the Commission (J.A. 126-128).

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also shows that, after an investigation of anniversary sales conducted by its competitors, petitioner had initiated its own anniversary program, which it expressly modeled after the anniversary program of Food Fair. (J.A. 146)

To suggest, without evidence of coercion, which is the touchstone of Section 2(f), that petitioner knew that the payments which it accepted from its suppliers were prohibited by Section 2(d) defies reason and logic.[11] Petitioner had no reason even to suspect that participating suppliers were not conforming to the essential requirements of the Robinson-Patman Act. Not one single participating supplier even suggested anything to the contrary.

Nevertheless, the Court of Appeals concluded that petitioner's "want of knowledge . . . was culpable." Petitioner, it said, knew of the illegality because the "record disclosed that, in refusing to participate in [petitioner's] program, many of its [suppliers] gave as their reason the fact that they could not make payments to [petitioner] . . . and at the same time make proportionate payments . . . to their other customers competing with [petitioner] . . ." (307 F. 2d at 187; p. 6a). On this foundation rested the full weight of the Court of Appeals' decision affirming the action of the Commission. Thus, without ever having established which of the petitioner's participating suppliers sold which of its products to which of petitioner's competi-

---

[11] Petitioner properly relied upon the established presumption that, in the absence of circumstances to the contrary, its suppliers were acting fairly, regularly and according to law. *United States* v. *Detroit Timber and Lumber Co.*, 200 U.S. 321, 331, 26 S. Ct. 282 (1906); *St. Joseph's Stockyards Co.* v. *United States*, 187 F. 2d 104 (C.A. 8, 1911).

tors either before, during or after petitioner's ann
versary sale, the Court of Appeals and the Commissio
reached the double conclusion that (1) petitioner
suppliers had violated 2(d) of the Robinson-Patma
Act by participating in petitioner's anniversary sale
and (2) petitioner knew that its suppliers had violate
Section 2(d) of the Robinson-Patman Act by pa
ticipating in its anniversary sales. Having reache
these conclusions, the burden of disproving that whic
had not in fact been established in the record (i.e
that participating suppliers had not proportionalize
the payments to other of their customers competin
with petitioner on goods of like grade and quality an
that petitioner knew this) shifted to the petitioner.

This startling procedure denied petitioner due pro
ess of law. Surely it was not in order to require tha
petitioner disprove each of the elements of a 2(d
violation in the case of each of its 150 participatin
suppliers. This burden is of the same order as tha
of proving that discriminatory prices are cost-justifie
"Fairness and convenience," said the Court in *Aut
matic Canteen,* compel the conclusion that this burde
be borne by the Commission. The same equities o
"fairness and convenience" apply to the case at bar.

**III. The Order Conflicts With Specific Admonition of Th
Court in Federal Trade Commission v. Henry Broch & Co
U.S. . 82 S. Ct. 431 (1962)**

The final order of the Court of Appeals greatly ex
panded the scope of the Order which the Commissio
had originally entered. Among other things, it directe
petitioner to cease and desist from accepting or co
tracting for the receipt of payments when it knew "
could reasonably have learned that such [paymen
were] not affirmatively offered or otherwise ma

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available . . . on proportionally equal terms. . . ." (Appendix B; p. 9a).

In *Federal Trade Commission* v. *Henry Broch & Co., supra,* this Court, while specifically noting that it was not deciding the question of whether the precise language of the order would conform to the terms of the 1959 Amendments to the Clayton Act, which conformed the enforcement provisions of that Act to those of the Federal Trade Commission Act, said (82 S. Ct. at 436):

> "We do not wish to be understood, however, as holding that the generalized language of paragraph (2) [of the order] would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application. . . ."

The order entered in this proceeding does not even comport with the language of the complaint and the decision, much less the admonition in *Broch, supra,* that it be clear and precise.

This order goes far beyond the "knew" or "should have known" "inducement" and "received", which were the predicates of the complaint against petitioner and the decision of the Commission. It compels petitioner to affirmatively determine whether any payments which it receives for promotional facilities, whether induced by it or not, whether actually paid to it or not, are offered on proportionally equal terms to other of its competitors purchasing goods of like grade and quality from the same suppliers. This was not what Congress

had in mind when it enacted Section 2(f) of the Robinson-Patman Act and we do not think that the Commission can, under the guise of carrying out the spirit of this legislation, extend the purposes of Section 2(f) by legislative fiat, by use of Section 5 of the Federal Trade Commission Act.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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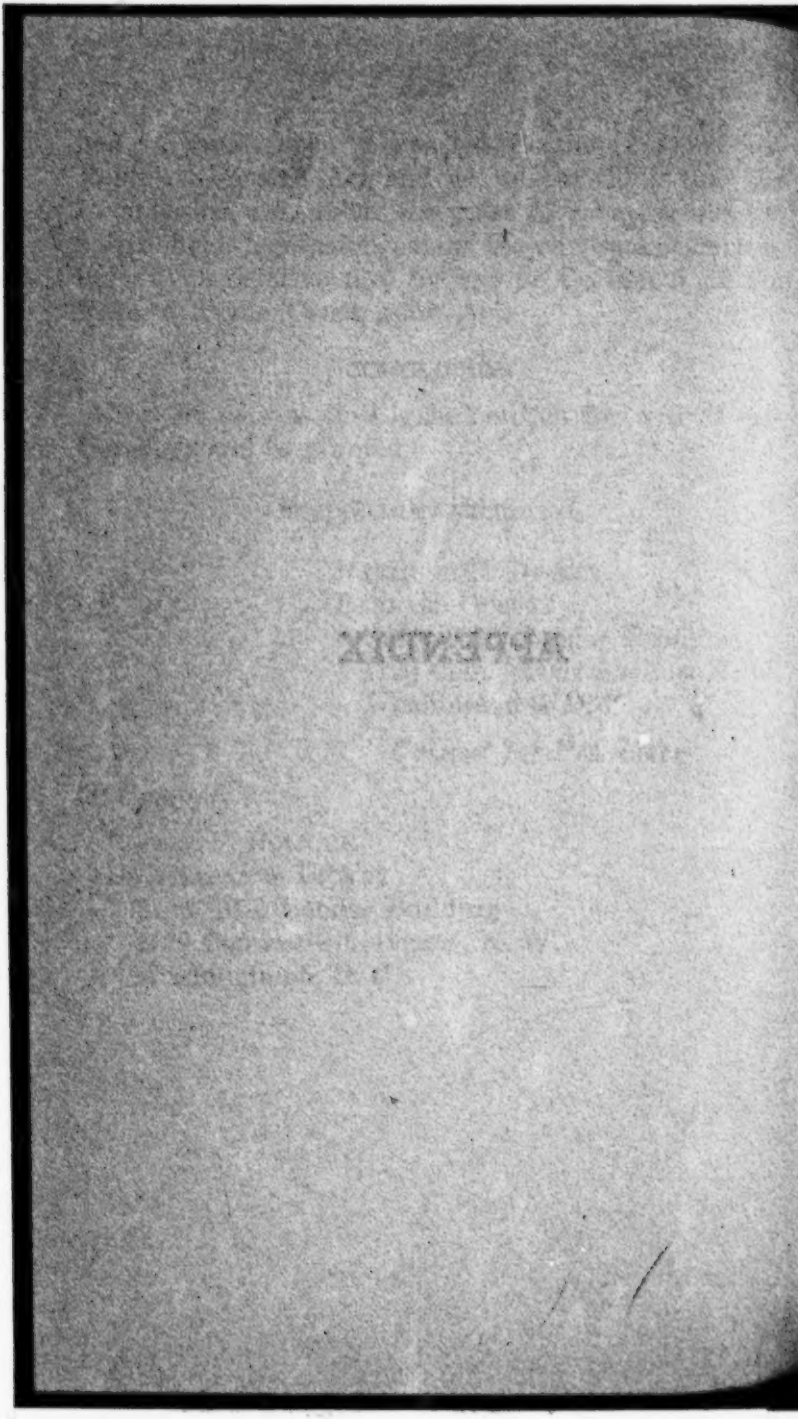
APPENDIX



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,507

GIANT FOOD INC., a corporation, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition for Review of Order of
the Federal Trade Commission

(Decided June 14, 1962)

Mr. Raymond R. Dickey, with whom *Messrs, Bernard Gordon* and *Robert F. Rolnick* were on the brief, for petition.

Mr. E. K. Elkins, Attorney, Federal Trade Commission, with whom *Mr. James McI. Henderson,* General Counsel, Federal Trade Commission, was on the brief, for respondent. *Mr. Alan B. Hobbes,* Assistant General Counsel, Federal Trade Commission at the time the record was filed, also entered an appearance for respondent.

Before WILBUR K. MILLER, Chief Judge, and BAZELON and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* This case is before us on petition for review of an order of the Federal Trade Commission directing petitioner, Giant Food Inc., to cease and desist from engaging in certain business practices held to violate § 5 of the Federal Trade Commission Act, 38 Stat.

719 (1914), as amended.[1] At the hearings before the hearing examiner, Giant chose to introduce no evidence after counsel supporting the complaint had rested his case.

Giant is the operator of an extensive chain of retail grocery stores and supermarkets, from which it resells to the general public the products it purchases from approximately 500 large suppliers situated throughout the United States. In 1954, 1955 and 1956, Giant sponsored certain "Anniversary" and "Candy Carnival" sales. In connection with these sales, Giant drafted and posted to its suppliers "contracts of participation" embodying an arrangement whereby each participating supplier would pay a specific sum of money to Giant, in return for which Giant would promote the products of each of the participating suppliers throughout the period allotted for the particular sale. About 150 of these contracts were actually executed by suppliers of Giant, as a consequence of which Giant rereceived substantial sums (e.g., $37,875 during its 1955 "Anniversary" sale).

On November 21, 1955, the Commission issued a complaint which charged that Giant had violated § 5 of the Federal Trade Commission Act by inducing and receiving, from many of its suppliers, payments as compensa-

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[1] 15 U.S.C. § 45 (1951):

"(a)(1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful.

• • • • •

"(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227 (b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

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tion or consideration for services or facilities furnished by Giant to such suppliers in connection with the resale of products sold to it by the suppliers, which payments, to Giant's knowledge, had not been made available on proportionately equal terms by such suppliers to their other customers competing with Giant in the sale and distribution of those products. The cease and desist order presently under review is the end product of the hearings conducted as a result of that complaint.

On this appeal, Giant's first argument is that it did not violate § 5 of the Federal Trade Commission Act by inducing and accepting the above mentioned payments from its suppliers. The heart of Giant's argument in this respect is that § 2(d)[2] of the Clayton Act, as amended by the Robinson-Patman Act, only makes it unlawful for a seller to make discriminatory payments of the type involved here; with respect to a buyer, that section is silent. From this interpretation read in conjunction with § 2(f)[3] of the Act, where the buyer is covered by the general prohibition against a knowing inducement or receipt of a discrimination in price, Giant would have us conclude that the Commission is powerless to proscribe Giant's conduct

---

[2] 49 Stat. 1527 (1936), 15 U.S.C. § 13(d): "It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

[3] 49 Stat. 1527 (1936), 15 U.S.C. § 13(f): "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

under the broad language of § 5 of the Federal Trade Commission Act. We do not agree.

In effect, what the Commission says is that it is an unfair method of competition in commerce, and an unfair or deceptive act or practice in commerce, for a buyer to induce and receive from a seller payments which it knows or should know the seller cannot lawfully make. As so interpreted, we do not think the Commission's action amounts to usurpation of legislative powers. It is true, of course, that § 2(d) speaks only in terms of a seller. However, we are not inclined to read the silence of § 2(d) concerning a buyer as approbation on the part of Congress of a practice whereby a buyer can, with impunity, induce and receive from a seller payments which the buyer knows, or should know, the seller is forbidden by law to make. The Commission's decision in this case cannot be read as if the Commission were attempting to render illegal a practice which was once lawful. The situation is to the contrary: The Commission is merely declaring to be an unfair method of competition a practice which is plainly contrary to the policy of the Clayton Act as amended by the Robinson-Patman Act. In our opinion, the Commission is authorized to make such a determination. *Grand Union Co.* v. *Federal Trade Comm'n*, —— F. 2d —— (2d Cir. 1962); *American News Co.* and *Union News Co.* v. *Federal Trade Comm'n*, —— F. 2d —— (2d Cir. 1962).

Giant next argues that the cease and desist order should be set aside because the Commission did not produce evidence that any injury to competition or competitors occurred as a result of Giant's action.

In the particular context of this case, we do not think that injury to competition is an essential element of a violation of § 5 of the Federal Trade Commission Act. Cf. *F.T.C.* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959). Since the buyer's knowing participation in such an offense is inextricably linked with the activity of the seller, we are

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of the opinion that the two should not be accorded different treatment with respect to reciprocal engagements. *Grand Union Co.* v. *Federal Trade Comm'n, supra.*

Giant further argues that the Commission did not make out a case sufficient to show that Giant had, or should have had, knowledge that the payments it received from its suppliers were unlawful, citing as principal authority *Automatic Canteen Co.* v. *Federal Trade Comm'n,* 346 U.S. 61 (1953). As the Commission's complaint is composed of language borrowed partly from § 2(d) and partly from § 2(f) of the Clayton Act, as amended, the reasoning found in Automatic Canteen would seem to be applicable here. Accordingly, Giant argues, the Commission cannot make out a case against a buyer upon the mere showing that the buyer induced and received from the seller a promotional allowance coming within the purview of § 2(d); the buyer should not be forced to act at his peril whenever he induces and receives from a seller payments of the type involved here.

However true the foregoing statements may be, *Automatic Canteen* certainly cannot be read to mean that a buyer can plead want of knowledge as a successful defense to charges in a complaint such as the instant one, in circumstances where it appears that such want of knowledge on the buyer's part was culpable. Cf. *American Motor Specialties* v. *Federal Trade Comm'n,* 278 F. 2d 225 (2d Cir. 1960), *cert. denied,* 364 U.S. 884. This being so, the question becomes whether or not, upon the record as a whole, the Commission introduced enough evidence to show that Giant, at the time it induced and received the payments from its suppliers, possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to Giant's competitors.

The record discloses that, in refusing to participate in Giant's program, many of its sellers gave as their reason

the fact that they could not make the payments to Giant suggested by the terms of its program and at the same time also make proportionate payments available on an equal basis to their other customers competing with Giant. In this connection it is to be noted that the program drafted by Giant was explicit in its insistence that it was not intended to supplant or be fitted into any of the promotional programs then maintained by Giant's suppliers.[4] In other words, Giant's program was designed to exist independently of and/or cotextensively with any of its suppliers' regularly available cooperative advertising programs. Moreover, the terms used by Giant in drafting its program were somewhat vague and general, thereby making it difficult for a supplier to formulate with any degree of certainty a program that would adequately satisfy its obligation in regard to Giant's competitors.

The cumulative effect of these facts supports a finding that Giant knew that it was the beneficiary of disproportionate payments through the program which it originated and sponsored. Cf. *American News Co. and Union News Co.* v. *Federal Trade Comm'n, supra; American Motor Specialties Co.* v. *Federal Trade Comm'n, supra.* We need not now determine how, under other circumstances, a buyer's inquiry must be carried out.

We have carefully examined Giant's other contentions, especially the assertion that it is a "packer" within the meaning of the Packers and Stockyards Act, 1921,[5] and find them without merit.

In conclusion, we reach the issue as to the broadness of the Commission's order. As the Supreme Court said in its

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[4] Giant's program expressly provided: "This contract does not alter or replace currently existing advertising or merchandising agreements between Giant Food Department Stores and participating manufacturers."

[5] 49 STAT. 159, 7 U.S.C. §§ 181-231.

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recent decision in *Federal Trade Comm'n* v. *Broch & Co.*, 368 U.S. 360, 367-68 (1962):

> "The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."

Accordingly, we think the order as presently worded is too broad, and should therefore be modified so as to reflect with more preciseness the actual situation as developed in the record under review. Specifically, the order should be directed toward the prohibition of a knowing inducement *and* receipt of, receipt of, or contracting for the receipt of discriminatory display and promotional allowances.[6] *Grand Union Co.* v. *Federal Trade Comm'n, supra; American News Co. and Union News Co.* v. *Federal Trade Comm'n, supra.* Cf. *Swanee Paper Corp.* v. *Federal Trade Comm'n,* 291 F. 2d 833 (2d Cir. 1961).

The order of the Commission will be modified as indicated in this opinion and, as modified, will be affirmed and enforced. Pursuant to Rule 38(1) of this court, the Commission shall submit a proposed enforcement decree consistent with this opinion.

Order affirmed as modified and, as modified, will be enforced.

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[6] As presently constituted, we think the record is too inconclusive to support a general prohibition against the mere "inducement" of a discriminatory promotion allowance.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 16,507

GIANT FOOD INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent*

Before: Wilbur K. Miller, Chief Judge, and Bazelon a
Bastian, Circuit Judges, in Chambers.

Final Decree Modifying and, as Modified, Affirming and Enforcing Order to Cease and Desist

Giant Food Inc., a corporation, petitioner herein, havi
filed in this court on July 27, 1961, petition to review a
set aside an order to cease and desist issued against it
June 1, 1961, by the Federal Trade Commission, respond
herein, in a proceeding before respondent entitled "In t
Matter of GIANT FOOD, INC. (Formerly Known as Gia
Food Shopping Center, Inc.), a corporation, DOCKET N
6459"; and the matter having been heard by this court
briefs and oral argument on March 22, 1962; and this cou
having rendered its decision on June 14, 1962;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED A
DECREED that the prayer of the aforesaid petition to s
aside the order of the Federal Trade Commission be, a
it hereby is, denied;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECRE
that the aforesaid order to cease and desist be, and it here
is, modified to read as follows:

"IT IS ORDERED that Giant Food, Inc., a corporatio
and its officers, and respondent's representative
agents and employees, directly or through any co

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porate or other device, in or in connection with the purchase in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of products for resale by the respondent, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in distributing and selling commodities and products in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing and receiving, receiving, or contracting for the receipt of, anything of value from any supplier as compensation or in consideration for display or promotional services or facilities furnished by or through respondent in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondent knows or could reasonably have learned that such compensation or consideration is not affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondent in the sale and distribution of such supplier's products."

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the order to

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APPENDIX C

Order

On consideration of petitioner's petition for rehearing by the division which heard and decided this case, it is

ORDERED by this division of the court that the petition for rehearing is hereby denied.

PER CURIAM.

Dated: Sep. 18, 1962

APPENDIX D

Order

On consideration of petitioner's petition for rehearing en banc, it is

ORDERED by the court that the petition is denied.

PER CURIAM.

Dated: Sep. 18, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 672

GIANT FOOD INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–7a) is reported at 307 F. 2d 184. The opinion of the Federal Trade Commission (J.A.[1] 121–129), is not yet officially reported.

JURISDICTION

The final decree of the court of appeals was entered on September 18, 1962 (Pet. App. 8a–9a), and petitions for rehearing and rehearing *en banc* were denied on the same day (Pet. App. 9a–10a). The petition

[1] "J.A." refers to the printed Joint Appendix in the court of appeals.

for a writ of certiorari was filed on December 17, 1962. The jurisdiction of this Court is invoked under 15 U.S.C. 45(c), and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's findings are supported by substantial evidence.

2. Whether in a proceeding under Section 5 of the Federal Trade Commission Act, in which a buyer is charged with inducing and receiving from its suppliers discriminatory allowances which it knew were not made available to its competitors on proportionally equal terms, the Commission must carry the burden of coming forward with evidence that the suppliers' grants of the allowances were not made in order to meet similar offers to the buyer from their competitors.

3. Whether the Commission's cease-and-desist order, as modified by the court of appeals, is sufficiently definite.

STATUTES INVOLVED

Pertinent portions of Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, and of Section 5 of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. 45(a)(1), are set forth at pages 3–4 of the petition.

STATEMENT

Petitioner, the operator of a large chain of retail grocery stores and supermarkets in Maryland, Virginia, and the District of Columbia,[2] purchases prod-

[2] At the time of the commencement of this case, petitioner operated 28 stores which, for the fiscal year ending April 30, 1955, had total sales of about $60 million (J.A. 98). As of

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ucts from approximately 500 suppliers located throughout the United States (J.A. 98). In 1954, 1955, and 1956, petitioner conducted various promotions called "Anniversary" sales or "Candy Carnival" sales, for which it prepared, and sent to virtually all of its suppliers, "contracts of participation." It urged them to make payments to petitioner of various amounts, such as $100, $250, $500, $750, or $1000, in return for advertising and promotion of the suppliers' products (J.A. 100–101; 121; 145). The sum specified in each contract was determined by petitioner (J.A. 143), and each contract explicitly provided that: "This contract does not alter or replace currently existing advertising or merchandising agreements between [petitioner] and participating manufacturers" (J.A. 223–228). About 150 of these contracts were accepted by suppliers throughout the country, as a result of which petitioner received a total of $37,875 during its "19th Anniversary Sale" in 1955 (J.A. 101; 121). Petitioner does not deny that it thus induced and received payments of substantial sums from suppliers.[3]

In response to petitioner's solicitations, some suppliers declined to accept the contract. The reasons given included the following: (a) that proportionalized payments could not be made to other customers; (b) that counsel had advised the suppliers that mak-

October 14, 1959, it operated 49 stores, grossing $116,617,056 (J.A. 102).

[3] Petitioner did not introduce any evidence in the administrative proceeding (J.A. 221).

ing such payments would violate the Clayton Act or (c) that such contracts would not be approved by the Federal Trade Commission (J.A. 102; 239 253; 255–257).

In a proceeding in which it was charged that petitioner had violated Section 5 of the Federal Trade Commission Act, the Commission found that petitioner had induced and received discriminatory payments, which it knew or had reason to know were not, and could not, be made available on proportionally equal terms to its competitors in the resale of like products (J.A. 102–106; 108–110; 115–116; 121 126). Such knowing inducement and receipt, the Commission concluded, constituted unfair methods of competition and unfair acts and practices in violation of Section 5 (J.A. 88–89; 116–117; 125–126). The Commission entered an appropriate cease-and-desist order (J.A. 119–120).

The court of appeals affirmed the findings of violations in all respects (Pet. App. A), but modified the order to make it more explicit.

ARGUMENT

1. Petitioner does not seek review of the holding below that a large retailer, which has knowingly induced its suppliers to violate Section 2(d) of the Clayton Act by granting preferential promotional allowances is itself guilty of engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Accord, *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92 (C.A. 2); *American News Co.* v. *Federal Trade Commission*, 300 F

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2d 104 (C.A. 2), certiorari denied, 371 U.S. 824. Rather, it presents the narrow questions whether there was sufficient proof to support the findings: (a) that products of a grade and quality similar to those on which the discriminatory payments were made had been sold by the suppliers to competitors of the petitioner; and (b) that petitioner knowingly induced and received the allowances. The court of appeals held that the findings (J.A. 124, 126) were supported by substantial evidence.[4] Since the substantiality of the evidence is an issue "which Congress has placed in the keeping of the Courts of Appeals" (*Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401), further review by this Court is not warranted.[5]

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[4] The first issue, covered in the court's general findings, is supported by direct testimony in the record (J.A. 106–107; 122; 147–148; 151–152; 157; 168–169; 175–177; 185–186; 188–189; 197–198). On the second issue, the court specifically concluded: "The cumulative effect of these facts supports a finding that Giant knew that it was the beneficiary of disproportionate payments through the program which it originated and sponsored" (Pet. App. 6a).

[5] Contrary to petitioner's contention (Pet. 16–18), there is no conflict with *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (C.A. 2). There the evidence on which the Commission relied for proof of sales of comparable products to other buyers merely showed the sale of "pork products", but without any further breakdown within this broad category; the court of appeals held that such evidence was insufficient to show that the seller had sold similar products to other buyers. Here, the evidence shows, and the Commission found, that payments to petitioner were for the latter's promotion of articles and brands which "are household bywords throughout the country", and that these suppliers were simultaneously selling these same articles and lines to petitioner's competitors, who were reselling them to the public (J.A. 124). The degree of

2. Petitioner argues that when read together, *Au*
matic Canteen Co. v. *Federal Trade Commission,*
U.S. 61, and *Exquisite Form Brassiere, Inc.* v. *F*
eral Trade Commission, 301 F. 2d 499 (C.A. D.C
certiorari denied, 369 U.S. 888, give it, as a buy
the benefit of all defenses which its suppliers wo
have had to a charge of making discriminatory p
ments, and, in addition, place on the Commission
burden of showing that the payments were not m
by the suppliers to meet competition for the buy
business; and that the Commission failed to int
duce evidence to meet this burden.

Even assuming that petitioner could utilize
Clayton Act defenses available to a seller under S
tions 2(a) and 2(b) as a defense to a charge
violating Section 5, the argument that the Comm
sion has the burden of negating such defenses r
on a misreading of *Automatic Canteen, supra.*
that case, the Court held, first, that a buyer char
with violation of Section 2(f) (which prohibit
buyer from knowingly inducing or receiving a
crimination in price prohibited by Section 2(a
could show that the discrimination in price which it
ceived was cost justfied, and, second, that the bur
of going forward with the evidence relating to
justification was on the Commission. The latter
ing was an application of the settled rule that "

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identification of the products necessary to establish that
crimination exists between customers is solely a question of
dence, and the fact that two different courts of appeals
different records, upheld the Commission's findings in one
but rejected them in another, presents no conflict of decisio

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burden of justifying a price differential ought to be on the one who 'has at his peculiar command the cost and other record data by which to justify such discriminations'" (346 U.S. at 79). The Court did not lay down the general rule that in all Commission proceedings the agency has the burden of negating all of a seller's defenses. The Court expressly differentiated between the burden of establishing the defense of cost justification and that of meeting competition, and declared that "[e]vidence * * * that the seller's price was made to meet a competing seller's offer to a buyer * * * might be available to a buyer more readily even than to a seller" (*id.*, n. 23). Thus, *Automatic Canteen* supports, rather than conflicts with, the decision below, since "considerations of fairness and convenience" properly call for placing upon the buyer, rather than upon the Commission, the burden of coming forward with evidence that the discriminatory allowances had been made to meet competition.[6] Unlike a seller's costs, information as to whether petitioner had received offers of allowances from a contributing supplier's competitors, and then asked the supplier to match them, was peculiarly within petitioner's knowledge.

3. Petitioner's attacks upon the scope and specificity of the order (Pet. 28–30) are similarly without substance. The court below fully heeded this Court's admonition in *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 368, as to the "necessity for fashioning orders which are, at the outset, sufficiently

[6] Actually, the proof of the manner in which the allowances were solicited in itself constituted a "coming forward" with evidence bearing on this issue. See p. 3, and the court of appeals discussion of the proportionalizing issue, Pet. App. 5a–6a.

clear and precise to avoid raising serious questions to their meaning and application." The Court specifically relied on this statement in *Broch* for its conclusion that "the order as presently worded is too broad," and it modified the order "so as to reflect with more preciseness the actual situation as developed in the record under review" (Pet. App. 7a). The substitution in the proviso, which prohibits inducing and receiving payments from suppliers, of the words "knows or could reasonably have learned" (Pet. App. 9a) for the Commission's phrase "knows or should know" (J.A. 120) made no change in the substance of the Commission's prohibition, but merely conformed it to the proof.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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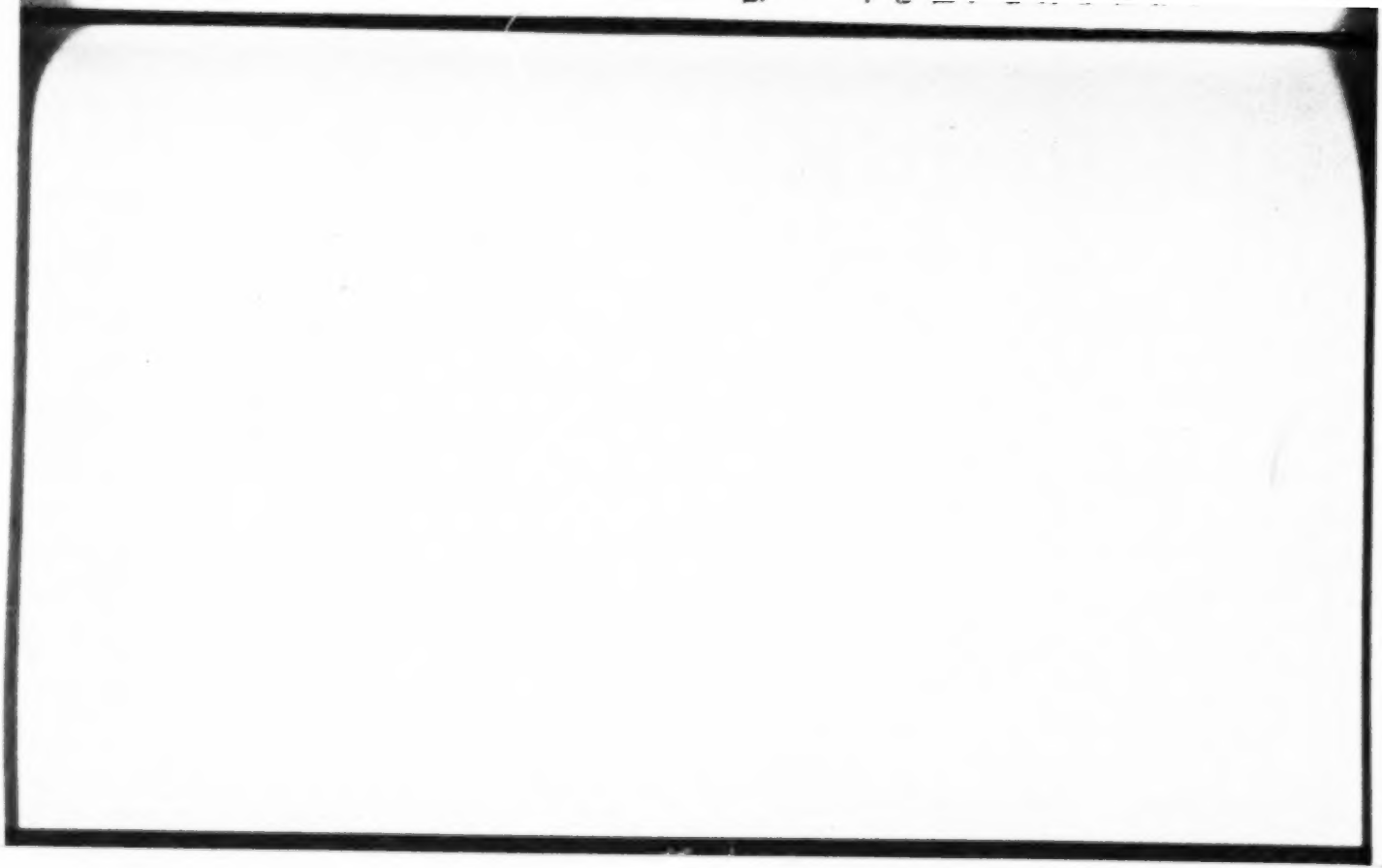

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 672

GIANT FOOD INC., *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

REPLY TO OPPOSITION OF THE FEDERAL TRADE COMMISSION

This brief in reply to the Federal Trade Commission's opposition to the petition for writ of certiorari in the above-captioned matter is filed in conformity with the rules of practice of this Court.

ARGUMENT

In opposing the petition for writ of certiorari, the Federal Trade Commission makes several points which require clarification.

The first point requiring clarification is the Commission's assertion that petitioner does not seek a re-

view of the holding below that a retailer who has induced its suppliers to violate Section 2(d) of the Clayton Act is itself guilty of engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. This assertion is erroneous. Petitioner does seek review of that holding. However, inasmuch as this Court denied a petition for certiorari based on precisely that holding in *American News Co.* v. *Federal Trade Commission*, S. Ct. , 371 U.S. 824 (1962), petitioner did not seek certiorari on the basis of that holding. Rather, it sought a writ of certiorari on issues which heretofore have never been presented to this Court. The precise issue to which the Commission makes reference is set forth in footnote 1 on page 3 of the petition. In the event the petition is granted, this issue will be presented.

The second point raised by the Commission which requires clarification is the Commission's bald assertion that the issues raised by the petition present nothing more than "narrow questions" of "whether there was sufficient proof." This, too, is erroneous. The issue presented by the petition is not whether there was substantial proof upon the whole record to support findings which were the predicates of the Commission's decision but, rather, whether the Commission in a proceeding under Section 5 could eliminate an essential element of proof. The issue is not one of substantial evidence but, rather, whether there is any evidence in the record at all. The issue involves the philosophy and theoretical apparatus which formed the basis for the Commission's action against petitioner. To prove that petitioner had induced its suppliers to violate Section 2(d), the Commission had to show that peti-

tioner had received promotional payments from suppliers which competitors of the petitioner did not receive from such suppliers in connection with the purchase of products of a grade and quality similar to the products on which petitioner received promotional payments. The naked assertion that the payments were made for promotion of articles and brands which are "household bywords throughout the country" is meaningless. Such an assertion does not and cannot sustain a finding that products of a grade and quality similar to those on which payments were made to petitioner were ever sold by suppliers participating in petitioner's promotion to petitioner's competitors. Such an assertion is also subject to the same defects as the Commission's logic that it was "reasonable to *infer* that products of grade and quality similar to those [petitioner] promoted in the [anniversary] sales were also being resold by [petitioner's] competitors not sharing in the [payments]" (JA 124). The inference was not justified by the record. The same type of assertion and logic were specifically rejected by the Second Circuit in reviewing a proceeding which the Commission had brought against one of petitioner's suppliers: *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365, 368 (C.A. 2, 1958). In that case, the examiner, whom the Commission sustained, held that all the products involved were pork, "and to the hearing examiner, ham is ham . . ." The Second Circuit reversed, holding that for the purposes of the Clayton Act, the Commission could not proceed on the assumption that because two products were derived from the same animal, they were of similar grade and quality.

The last point in the Commission's brief which requires clarification here is the assertion that *Automatic Canteen*, 346 U.S. 61, 73 S. Ct. 1017 (1953), supports rather than conflicts with the decision below. The Commission argued that petitioner should have borne the burden of the 2(b) defense because evidence of meeting competition was more available to the petitioner than to the Commission. This fact is not true. Petitioner had no knowledge of the basis on which any of its suppliers participated in its anniversary promotion. Petitioner could only assume, as this Court must in the absence of evidence to the contrary, that participants were conforming to the requirements of the Clayton Act when they made promotional payments to petitioner.

CONCLUSION

For the reasons stated hereinabove and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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